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STATE OF MINNESOTA; MINNESOTA DEPARTMENT OF NATURAL RESOURCES; RODNEY SANDO, Commissioner of Natural Resources; ARNE CARLSON, Governor of Minnesota; RAYMOND B. HITCHCOCK, Assistant Commissioner of Operations, Minnesota Department of Natural Resources,

Petitioners,

v.

MILLE LACS BAND OF CHIPPEWA INDIANS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE NATIONAL CONGRESS OF AMERICAN INDIANS, AFFILIATED TRIBES OF NORTHWEST INDIANS, LUMMI TRIBE, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

(Additional Amici Listed on Inside Front Cover)

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ADDITIONAL LIST OF AMICI

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Swinomish Indian Tribal Community
Tulalip Indian Tribes
Stillaguamish Indian Tribe
Muckleshoot Indian Tribe
Suquamish Indian Tribe
Puyallup Indian Tribe
Nisqually Indian Tribe
Squaxin Island Indian Tribe
Skokomish Indian Tribe
Port Gamble S'Klallam Indian Tribe
Jamestown S'Klallam Indian Tribe
Lower Elwha S'Klallam Indian Tribe
Makah Indian Tribe
Quileute Indian Tribe
Quinault Indian Nation
Hoh Indian Tribe
Confederated Tribes of the Warm Springs Reservation of Oregon
Confederated Tribes and Bands of the Yakama Indian Nation
Sault Ste. Marie Tribe of Chippewa Indians
Bay Mills Indian Community
Grand Traverse Band of Ottawa and Chippewa Indians
Grand Portage Band of Chippewa
Crow Tribe of Indians
Confederated Salish & Kootenai Tribes of the Flathead Reservation
Leech Lake Band of Chippewa
Colorado River Indian Tribes
Spirit Lake Tribe
Confederated Tribes of the Umatilla Indian Reservation

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INTEREST OF THE AMICI[1]

Established in 1944, the National Congress of American Indians ("NCAI") is the oldest and largest organization addressing American Indian interests in the United States, representing more than 250 American Indian tribes and Alaska Native villages, and native American citizens. The preservation of off-reservation hunting, fishing and gathering rights is vitally important to NCAI and its members.

The 49 members of the Affiliated Tribes of Northwest Indians govern reservations within Washington, Oregon, Idaho, Alaska, western Montana and northern California. Each Tribe exercises hunting, fishing and gathering rights under treaties signed with the United States or Executive Orders establishing their reservations.

The Amici Tribes listed in footnote two have the treaty "right of taking fish, at all usual and accustomed grounds and stations, . . . in common with all citizens . . ., and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, . . . on open and unclaimed lands . . . ."[2] These rights have been upheld seven times by this Court, most recently in *Washington v. Passenger Fishing Vessel Ass'n.* 443 U.S. 658 (1979).

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[1] Pursuant to Rule 37.6 of the Rules of this Court, Amici state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than amici and their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of the brief, and the consent letters have been filed with the Clerk of the Court.

[2] The tribes are the Lummi, the Nooksack, the Sauk Suiattle, the Upper Skagit, the Swinomish, the Tulalip, the Stillaguamish, the Muckleshoot, the Suquamish, the Puyallup, the Nisqually, the Squaxin, the Skokomish, the Port Gamble S'Klallam, the Jamestown S'Klallam, the Lower Elwha S'Klallam, the Makah, the Quileute, and the Yakima and Quinault Nations.

The Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Salish & Kootenai Tribes of the Flathead Reservation of Montana, the Confederated Tribes of the Umatilla Indian Reservation, and the Confederated Tribes and Bands of the Yakima Indian Nation have treaty rights to hunt, fish, and gather on and off of their reservations. The off-reservation fishing rights were the subject of litigation, and were affirmed in *Sohappy v. Smith*, 302 F. Supp. 899, (D. Ore. 1969), later denominated *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981); *United States v. Oregon*, 718 F.2d 299 (9th Cir. 1983).

The Sault Ste. Marie Tribe of Chippewa Indians, the Bay Mills Indian Community and the Grand Traverse Band of Ottawa and Chippewa Indians, exercise treaty fishing rights in a portion of the Great Lakes waters of Michigan under Article Thirteen of the Treaty with the Ottawa and Chippewa, March 28, 1836, 7 Stat. 491: "The Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement." State and Federal courts construe the treaty to guarantee the tribes use of Great Lakes fishery resources. *See People v. LeBlanc*, 399 Mich. 31, 248 N.W.2d 199 (1976); *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), *mod. in part*, 653 F.2d 277 (6th Cir. 1981).

The Grand Portage Band of Chippewa is one of six bands of the Minnesota Chippewa Tribe. Pursuant to the Treaty of September 30, 1854, Band members exercise hunting and fishing rights on certain off-reservation lands in Minnesota.

The Leech Lake Band of Chippewa, one of six member bands of the Minnesota Chippewa Tribe, reserved the right to hunt, fish, and gather wild rice on ceded lands in Minnesota and Wisconsin in treaties with the United States, dated July 29, 1837, and October 4, 1842.

The Spirit Lake Tribe, formerly known as the Devils Lake Sioux Tribe, is a descendent of the Sisseton and Wahpeton Bands of the Sioux Nation. Congress has recently reaffirmed that the Devils Lake reservation in North Dakota, reserved by treaty in 1867, is the Tribe's "permanent homeland." Pub. L. 97-459, 96 Stat. 2515. The Tribe asserts ownership to the submerged lands of Devils Lake.

The federally recognized Colorado River Indian Tribes inhabit a reservation in Arizona and California. The predecessors of the Tribes fished in the Colorado River and hunted on its banks, and the Tribes' members continue to do so today.

The Crow Tribe of Indians is a federally recognized American Indian Tribe located in south central Montana. The Second Fort Laramie Treaty of May 7, 1868, 15 Stat. 649, reserves to the Crow Indians "the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts."

In sum, Amici represent the majority of American Indians and have an abiding interest in the hunting, fishing, and gathering rights of native Americans which are protected by numerous treaties with the United States. Amici are profoundly concerned about the adverse effect on those interests that would arise under the interpretation of the Equal Footing Doctrine proposed by Minnesota in this case. Minnesota's argument—that its admission to the Union implicitly terminated pre-existing off-reservation hunting, fishing, and gathering rights recognized in treaties with the United States—might eliminate valuable rights that have existed for decades and disrupt numerous tribal programs designed to manage the reasonable exercise of those rights. As Amici demonstrate in this brief, the State's legal argument is con-

trary not only to ordinary rules of treaty construction, but also to precedents of this Court applying the Equal Footing Doctrine for more than 100 years. Amici wish to present their views to assist the Court in evaluating Minnesota's claim under the Equal Footing Doctrine.

STATEMENT OF THE CASE

1. In an 1837 treaty with the United States, the Chippewa Indians expressly reserved rights to hunt, fish, and gather wild rice—"usufructuary" rights—on aboriginal lands which they were ceding to the United States. Under the treaty, the Chippewa ceded 13 million acres of land in present day Minnesota and Wisconsin, however:

> The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, [wa]s guarant[e]ed to the Indians, during the pleasure of the President of the United States. [Treaty with the Chippewa of July 29, 1837, 7 Stat. 536, 537 (Pet. App. 484).]

Petitioners maintain that the United States subsequently terminated these reserved rights in an 1850 Executive Order. Alternatively, petitioners claim that one of the Chippewa Bands relinquished its reserved rights in an 1855 treaty with the United States. While the Amici Tribes strongly disagree with both of these assertions for the reasons stated in the briefs of respondents, Amici do not further address these fact-specific questions.

Rather, in this brief, the Amici Tribes address solely the question whether a federally recognized reservation of usufructuary rights on off-reservation lands is terminated by implication when the Territory in which such rights may be exercised becomes a State.[3] This issue is raised because in 1858, by an Act of Congress, the Territory of Minnesota was admitted to the Union as a State "on an equal footing" with other States. Act of May 11, 1858, 11 Stat. 285. Although nothing in the act of admission purported to abrogate treaties affecting the Territory of Minnesota previously negotiated by the United States, petitioners broadly urge that Minnesota's admission to the Union necessarily terminated the Chippewas' usufructuary rights under the 1837 Treaty. Amici demonstrate that Minnesota's position simply cannot be squared with myriad decisions of this Court holding that the Federal Government has clear constitutional authority to enter into treaties recognizing tribal usufructuary rights on lands outside of a reservation, and that such Federal treaty rights are not irreconcilable with State sovereignty and remain in full force and effect after the lands in question become part of a State.

2. Petitioners have relied solely on *Ward v. Race Horse*, 163 U.S. 504 (1896), to argue that, by necessary implication, the United States repealed the 1837 Treaty provision reserving the Chippewas' off-reservation usufructuary rights when it admitted the Territory of Minnesota to Statehood in 1858. The district court rejected this argument, and the court of appeals affirmed.

The court of appeals first distinguished *Race Horse*. The court explained that, by the terms of the treaty at issue, the hunting rights in *Race Horse* were repealed at Statehood, because they were "temporary" and depended upon continuous United States' ownership of the lands. In contrast, the court found that the usufructuary rights at issue in this case were intended to be "continuing" and were not tied to ownership of the lands. Pet. App. 56 & n.42. Second, the court concluded that the 1837 Treaty in no way "offend[ed] the State's sovereignty," citing *United States v. Winans*, 198 U.S. 371 (1905), and *Tulee v. Washington*, 315 U.S. 681 (1942). Pet. App. 58. Finally, the court of appeals pointed out, Congress must clearly indicate its intent to impair Indian

[3] This case involves only off-reservation usufructuary rights. Tribal "authority to control hunting and fishing on the reservation" unquestionably preempts State jurisdiction over wildlife there. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 338 (1983).

treaty rights, and the Act of Congress admitting Minnesota contained no such clear indication. Pet. App. 59.

SUMMARY OF ARGUMENT

1. This Court has held that the Constitution implicitly requires that all States be admitted to the Union on an equal footing with the original 13 States. *Coyle v. Smith*, 221 U.S. 559, 565-66 (1911). The State relies on this principle—termed the Equal Footing Doctrine—to argue that its admission into the Union worked an implicit repeal of the Chippewas' reserved treaty rights. This interpretation of the Doctrine cannot be squared with numerous decisions of this Court declaring the supremacy of reserved treaty rights in the face of Statehood. In effect, what Minnesota seeks is not equality with other States, but special treatment based on a reading of the Equal Footing Doctrine that has been soundly rejected. This brief explains the proper contours of the Equal Footing Doctrine and describes what the doctrine does (protects certain core aspects of State sovereignty), and what the doctrine does not do (grant an immunity from treaty provisions within the bounds of the Federal Government's constitutional powers with respect to Indian tribes).

Properly understood, the Doctrine has two components: *First*, it prohibits the Federal Government from exceeding its constitutionally prescribed authority by infringing upon fundamental sovereign powers and rights of States when exercising its power to admit new States to the Union. *Second*, it makes clear that States admitted to the Union have sovereign ownership of shorelines and lands underlying navigable waters ("submerged lands"), unless the Federal Government has plainly provided otherwise.

The Equal Footing Doctrine does not go beyond these protections of fundamental attributes of State sovereignty to erode the Federal Government's proper exercise of its

treaty power and its authority under the Property Clause and the Indian Commerce Clause of the Constitution. Just as such authority could (and can) be exercised in the original 13 States, so it could (and can) be exercised with respect to the Territories and newly admitted States. The Equal Footing Doctrine does not establish a special rule that the Federal Government must plainly provide that it is precluding or limiting inconsistent State regulation in order to do so.

Thus, the Chippewas' federally recognized usufructuary rights on off-reservation lands were not terminated by implication under the Equal Footing Doctrine when the Territory of Minnesota was admitted to the Union. Petitioners incorrectly contend that the treaty right is wholly irreconcilable with Minnesota's status as a sovereign State with power to regulate wildlife within her borders. Minnesota's position cannot be squared with almost a century of authority, firmly upholding the Federal Government's power to recognize off-reservation usufructuary rights and to preclude or limit inconsistent State regulation. *See, e.g., United States v. Winans*, 198 U.S. 371 (1905); *Antoine v. Washington*, 420 U.S. 194 (1975); *Washington v. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979). To sustain Minnesota's contention, these cases would have to be overruled. Accordingly, it is Minnesota's position that misconceives the proper division of power in the Federal system.

The Federal Government may regulate wildlife within State borders pursuant to any valid constitutional power. And while the States unquestionably have police power to regulate wildlife, it is equally certain that, under the Supremacy Clause, such State regulation is barred to the extent it is inconsistent with Federal law. *See Kleppe v. New Mexico*, 426 U.S. 529 (1976); *Missouri v. Holland*, 252 U.S. 416 (1920); *Winans*, 198 U.S. at 380. If the two legal requirements conflict or if State law impairs the Federal right, the State regulation

must give way. *See generally Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The Equal Footing Doctrine simply does not apply in areas—such as fish and wildlife regulation—where the Federal Government and the State have concurrent sovereign authority to act. *See, e.g., United States v. Winans*, 198 U.S. at 380 (police power over wildlife); *Winters v. United States*, 207 U.S. 564 (1908) (power over water rights); *Johnson v. Gearlds*, 234 U.S. 422 (1914) (police power over liquor).

In fact, when the State's police power over wildlife is in tension with a Federal treaty with an Indian tribe, the treaty right is protected by established rules of construction. Treaties reserving Indian rights and lands are liberally construed, and such treaty rights are not terminated by implication at Statehood or at any other time unless there is "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *United States v. Dion*, 476 U.S. 740 (1986). More concretely, the federally recognized reservation of usufructuary rights in the 1837 Treaty must be generously construed and may not be deemed repealed by implication simply because the affected lands became part of the State of Minnesota. Nor does the Federal treaty right entirely preempt State regulation of wildlife. Instead, this Court's decisions require that the Federal treaty right and the State's police power be reconciled by enforcing the treaty right, unless it is inconsistent with State regulation that is "necessary" for conservation. *Antoine*, 420 U.S. at 207. In this way, the State's interests are accounted for, and the Federal treaty right is preserved. That is precisely what the lower courts did in this case.

2. Petitioners' Equal Footing argument rests entirely on *Ward v. Race Horse*, 163 U.S. 504 (1896), which held that a reserved "right to hunt on unoccupied lands of the United States" under certain conditions was terminated by necessary implication when those lands become part of the State of Wyoming. *Id.* at 514. *Race Horse*, however, rests on principles that this Court has rejected for at least a century.

First, the *Race Horse* Court incorrectly assumed that the State's police power over wildlife is inviolate—"an essential attribute of its governmental existence," 163 U.S. at 516. This Court has since held, however, that although the State has an important interest in wildlife regulation within its borders, State regulation must yield to a valid exercise of Federal power. *See, e.g., Holland* and *Kleppe, supra*, and *Hunt v. United States*, 278 U.S. 96 (1928). This Court thus has rejected the fundamental premise of *Race Horse*.

Second, the Court's alternative basis for its decision—that the treaty rights were temporary and that temporary rights are necessarily repealed at Statehood—itself rests on two faulty assumptions. The Court incorrectly assumed that "unoccupied" lands of the United States would inevitably become occupied and that the right to hunt on such lands was temporary. The United States, however, has the power to reserve property for public purposes, including purposes that relate to its sovereignty over Indian tribes, so the treaty right at issue in *Race Horse* was not necessarily temporary. The Court's assumption that temporary rights are necessarily terminated by Statehood is equally ill-founded. It is contrary to the usual principle of construction that when reasons for termination of a right are expressly stated, the right does not terminate for unstated and unrelated reasons. It is also contrary to this Court's cases holding that treaty rights which impair State power and which are temporary by their terms are not presumptively terminated by Statehood. *See, e.g., Johnson v. Gearlds*, 234 U.S. 422; Part II.B., *infra*.

For these reasons, *Race Horse* should be overruled or strictly limited to the proposition for which it has re-

cently been cited by this Court—*viz.*, that States can regulate usufructuary rights reserved in a treaty when necessary in the interest of conservation. *E.g., Washington v. Passenger Fishing Vessel Ass'n*, 443 U.S. at 682 n.25.

ARGUMENT

I. THE EQUAL FOOTING DOCTRINE DOES NOT APPLY IN THIS CASE.

The Northwest Ordinance of 1787 authorized the creation of new States in the western Territories, and mandated that those States be on an "equal footing with the original States in all respects whatever."[4] And, although the phrase "equal footing" does not appear in the Constitution or in the act of admission of every State, this Court has held that the Constitution implicitly mandates a "union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *Coyle v. Smith*, 221 U.S. 559, 567 (1911).

The Equal Footing Doctrine developed by this Court has two related, but independent components: *First*, the Federal Government may not exceed the bounds of its constitutional powers by impairing the core sovereign authority of newly admitted States when exercising its power to admit new States to the Union. *Second*, newly

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[4] The equal footing language in the Ordinance had its origin in the fears of Thomas Jefferson and others that admission of western Territories to the Union as second-class States would endanger the stability and growth of the United States. Specifically, it was believed that inferior status would cause western discontent and disloyalty, giving rise to settler independence movements and allowing Great Britain and Spain to expand their influence in North America. *See* G. Stewart, *The Northwest Ordinance and the Balance of Power in North America, in The Northwest Ordinance: Essays on its Formulation, Provisions, and Legacy*, 25 (Williams ed. 1988).

admitted States come into the Union with ownership of their submerged lands, unless the Federal Government has plainly provided otherwise.

The protection afforded by the Equal Footing Doctrine is confined to these fundamental attributes of State sovereignty. It does not affect or limit in any way the powers that are conferred upon the Federal Government by the Constitution, or alter the principle that a valid Federal exercise of power preempts inconsistent State law. The Equal Footing Doctrine is not some extraordinary anti-preemption theory that confers unusually strong protections for States as they enter the Union. The doctrine embraces equality, which means that each entering State is subject to the same rules and the same Federal powers that apply to the original 13 States under the Supremacy Clause. Accordingly, where a Federal statute or treaty regulates conduct within a newly formed State—including conduct related to fish and wildlife—that law remains effective after Statehood, unless the law impairs the newly formed State's sovereignty protected by the Tenth Amendment or core principles embedded in the constitutional plan under Our Federalism. If it does not, the new State's regulatory authority is restricted to the extent it conflicts with federal law (whether statutory or treaty) under traditional principles of preemption.

Minnesota's position, however, is that Federal treaties recognizing off-reservation usufructuary rights impair the State's fundamental sovereign right to regulate wildlife and thus necessarily terminate at Statehood. The Court has rejected this argument many times, commencing with *United States v. Winans*, 198 U.S. at 380, and has in this century refused numerous invitations to find an equal footing violation in a Federal law that limits State sovereignty over wildlife. Instead, the Court enforces off-reservation usufructuary rights recognized in treaties against claims that such rights impair State sovereignty. *See* cases cited in Part I.C.3.

Amici first describe the two components of the Equal Footing Doctrine and then demonstrate that neither applies in this case.

A. The First Component of the Equal Footing Doctrine: Indefeasible Sovereign Powers.

The Constitution grants to the Federal Government broad, enumerated powers, particularly in regulating relations between the United States and Indian Tribes. Once a valid Federal law exists, State regulation is preempted if it is inconsistent with that law. Notwithstanding the breadth of Congress' authority, however, the Constitution bestows upon the States certain fundamental powers that the United States is absolutely forbidden to preempt or strip away. The Equal Footing Doctrine provides that the Federal Government may not, in admitting new States to the Union, go beyond the scope of its broad, enumerated powers to impair the fundamental powers of the newly admitted States.

The principal case so holding is *Coyle v. Smith*, 221 U.S. 559 (1911). In that case, the Court employed the Equal Footing Doctrine to invalidate a provision of Oklahoma's act of admission forbidding Oklahoma to move its State capital for a period of some years:

> The power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen States could now be shorn of such powers by an act of Congress would not be for a moment entertained. [*Id.* at 565.]

The Court explained that "when a new State is admittted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States, and that such powers may not be constitutionally diminished, impaired or shorn away by any con-

ditions, compacts or stipulations embraced in the act under which the new State came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission. . . . [The location of capital provision] is referable to no power granted to Congress over the subject, and . . . [such authority cannot] be implied from the power to admit new States." *Id.* at 573. *See also Hawkins v. Bleakly*, 243 U.S. 210 (1917) (holding that, under the Equal Footing Doctrine, Iowa must be allowed independently to decide whether to have jury trials in worker compensation cases, despite the Northwest Ordinance's guarantee of jury trial to Iowa territory residents), *Cincinnati v. Louisville & Nashville Railroad*, 223 U.S. 390 (1912) (holding that, under the Equal Footing Doctrine, Ohio cannot be stripped of its eminent domain power). *Cf. United States v. Texas*, 339 U.S. 707, 718 (1950) (holding that, on admission to the Union, Texas ceded sovereignty over its marginal sea to the United States; as "an incident to the transfer of [Texas'] sovereignty any claim that Texas may have had to the marginal sea was relinquished to the United States").[5]

Newly admitted States thus may not be shorn of "necessary attributes [of] an independent sovereign government"

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[5] Additional irreducible attributes of State sovereignty are defined in the Court's cases addressing the Tenth Amendment and principles of federalism. *See New York v. United States*, 505 U.S. 144 (1992) (holding that federal statute requiring States to take title to and possession of waste generating property and to assume liability for certain damages incurred in relation to that property is unconstitutional because it forces the States to implement federal regulations); *United States v. Lopez*, 514 U.S. 549, 564 (1995) (holding invalid a federal exercise of the Commerce Clause power that usurped the State's police power "in areas such as criminal law enforcement [and] education where States have historically been sovereign"); *Printz v. United States*, 117 S. Ct. 2365 (1997) (holding invalid federal gun legislation because it compels States to execute federal laws).

by any Federal Government statement or action, no matter how plain the Federal Government's intent. *Coyle v. Smith*, 221 U.S. at 575 (citation omitted). This component of the doctrine is an important, but relatively modest, constraint on Federal authority. And it has only limited relevance to the Federal Government's treating with Indian tribes, as such activity takes place pursuant to constitutional provisions vesting the Federal Government with plenary power in the area.

B. The Second Component of the Equal Footing Doctrine: A Defeasible Sovereign Right Protected by a Plain Statement Requirement.

A second component of the Equal Footing Doctrine evolved during the 19th century. The Court determined that State ownership of submerged lands is an essential attribute of State sovereignty, which the United States cannot eliminate except when "necessary . . . in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States holds the territory." *Shively v. Bowlby*, 152 U.S. 1, 48 (1894). To avoid inadvertent conveyances of fee simple title to submerged lands, the Court also held that it would not find a divestiture of a State's title "unless the [Federal] intention [to do so] was definitely declared or otherwise made very plain." *United States v. Alaska*, 117 S. Ct. 1888, 1905 (1997).[6] *Accord United States v. Holt State Bank*, 270 U.S. 49, 55 (1926); *U.S. v. Oregon*, 295 U.S. 1, 14 (1935); *Montana v. United States*, 450 U.S. 544, 552 (1981); *Utah Div. of State Lands*

[6] The United States is empowered in these circumstances not only to convey title to, but also to reserve submerged lands for public purposes. *See United States v. Alaska*, 117 S. Ct. at 1906.

v. United States, 482 U.S. 193, 196-97 (1987).[7] The Court felt that history compelled it to provide special protection to the States' title to submerged lands.

In sum, the Court has provided the States' title to submerged lands with heightened—though certainly not absolute—protection from Federal Government impairment.[8] This second component of the Equal Footing Doctrine, however, extends no further than the States' ownership of submerged lands.[9]

[7] This presumption, though powerful, has been defeated in cases where the United States has conveyed title to submerged lands to Indian tribes. In such cases, another powerful presumption is at work—*i.e.*, the presumption that treaty rights should not be impaired unless Congress has made clear its intention to do so. That presumption is supported by a strong principle of construction—that treaty rights should be generously construed as the Indians would have understood them. *See Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918). *Cf. Brewer Oil Co. v. United States*, 260 U.S. 77 (1922) (holding, as a matter of law, that the Arkansas River is not navigable and therefore that a federal grant of an area encompassing the River included the bed and divested the State of title).

[8] The unique and important relationship between sovereignty and submerged lands is also reflected in the public trust doctrine. *See Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892).

[9] The Court also requires a plain statement from the Federal Government before it will find a Federal impairment of the State's authority "to determine the qualifications of their most important government officials," *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991), or a Federal abrogation of a State's sovereign immunity from suit in federal court, *Blatchford v. Native Village of Nootak*, 501 U.S. 775, 786 (1991). If the Federal Government attempted to so impair the fundamental sovereignty of a single State or a few States, this Court likely would require a plain statement of intent to do so under the Equal Footing Doctrine. But the Court does not impose a plain statement requirement solely because the Federal Government is acting in areas "traditionally regulated by the States"; rather the Court raises the bar for Federal action above traditional presumption analysis only when the Federal Government impairs State powers that "go to the heart of representative government" and

C. The Equal Footing Doctrine Extends No Further Than These Fundamental Attributes of State Sovereignty: The State's Police Power Is Otherwise Preempted When It Is Inconsistent With Or Impairs Rights Under Valid Federal Law.

1. Minnesota's contention that the Equal Footing Doctrine extends to insulate State police power over wildlife from any Federal impairment is plainly wrong. It has been rejected in a long line of this Court's decisions, upholding Federal statutes, treaties, and regulations governing fish and wildlife within State borders. Indeed, the Court has consistently enforced treaties recognizing off-reservation usufructuary rights, refuting both expressly and implicitly any claim that enforcement of such rights violates an affected State's equal footing rights. *See* Part I.C.2. These cases faithfully reflect the complementary roles of the Federal Government and the States in our Federal system, and properly recognize that the Equal Footing Doctrine plays an important, but limited role in that it protects only the most fundamental attributes of State sovereignty.

To demonstrate this, Amici first establish the general proposition that, even where the States have important interests and historic powers, the Federal Government's actions within the realm of its constitutional authority do not give rise to equal footing violations, and the Court does not apply a plain statement requirement. Amici then show that this established rule applies in a way that requires the State's power to regulate wildlife to be reconciled with Federal law, including treaties.

2. While the Federal Government did not have title to public lands in the original 13 colonies when they became States, and while title to public lands was and is an important component of State sovereignty, the Federal Government nonetheless chose to exercise its constitutional

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are "of the most fundamental sort for a sovereign entity." *Gregory*, 501 U.S. at 460-63 (citation omitted).

authority to retain title to public lands in the western Territories when they were admitted to the Union.[10] The Court has not treated this Federal retention of title to public lands as implicating the Equal Footing Doctrine. Thus, there is no presumption that the Federal Government has conveyed public lands to a new State upon admission to the Union absent a plain statement to the contrary. *See United States v. Oregon*, 295 U.S. 1, 14 (1935); *Scott v. Lattig*, 227 U.S. 229 (1913).

In *Wisconsin v. Hitchcock*, 201 U.S. 202 (1906), the State argued that, upon admission to the Union, it received title to tracts of public land to use for schools through a conveyance from the United States, although a prior treaty granted the same parcel to Indians "until they were required to surrender it by the President of the United States." The Court did not presume that the land passed to the State (either implicitly or through construction of the act of admission), and instead held that "[w]hatever right the State of Wisconsin acquired by the enabling act . . . was subordinate to this right of occupancy for which the Indians stipulated and which the United States recognized." *Id.* at 213-14.[11]

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[10] *See United States v. Texas*, 339 U.S. at 716 ("[s]ome States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil").

[11] *See United States v. Gratiot*, 39 U.S. 526, 536 (1840) (upholding continued application of law authorizing United States to lease lead mines in Territory after it became part of the State of Illinois); *Light v. United States*, 220 U.S. 523, 536 (1911) (holding that the Federal Government "can withhold or reserve the land . . . indefinitely").

Nor is there an Equal Footing presumption that States obtain title to submerged lands seaward of the low water line. *See United States v. California*, 332 U.S. 19 (1947); *United States v. Texas*, 339 U.S. 707, 717 (1950). (After these cases were decided, Congress enacted legislation to create a presumption that States hold title to submerged lands seaward of the low water mark. *See Alabama v. Texas*, 347 U.S. 272 (1954); 43 U.S.C. § 1301. *But see id.* 1313(b).

Similarly, there is no presumption that, absent a plain statement to the contrary, a Federal reservation of water rights is terminated by implication upon Statehood as an impairment of the State's power over water. *See Winters v. United States*, 207 U.S. 564 (1908). Indeed, in *Winters*, far from presuming that Montana obtained the right to appropriate or regulate appropriation of water at Statehood, the Court held that "[t]he power of the [Federal] Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be," that the treaty gave the tribe an *implied right* to appropriate water, and that Montana's admission to the Union did not terminate the tribe's right. *Id.* at 577. *See also Arizona v. California*, 373 U.S. 546, 597-98 (1963) (Congress' broad power to reserve water for Indian tribes is not limited by the Equal Footing Doctrine).

Finally, Federal laws and treaties regulating liquor within a Territory are not presumptively repealed when the Territory becomes a State, and the Court does not require a plain statement of congressional intent to impair the State's police power over liquor in order for such laws and treaties to survive Statehood. Instead, in a line of cases commencing with *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188 (1876), the Court has upheld treaties promising that United States statutes regulating liquor would be enforced in lands ceded by the Indians, and rejected claims that such treaties violate a State's equal footing with other States.

In *Forty-Three Gallons of Whiskey*, for example, the treaty made such United States laws applicable in ceded lands " 'until otherwise directed by Congress or the President of the United States.' " *Id.* at 193 (citation omitted). Rejecting the State's equal footing claim, this Court enforced the treaty:

> It is not easy to see how [the treaty] infringes upon the position of equality which Minnesota holds with

> the other States. The principle that Federal jurisdiction must be everywhere the same, under the same circumstances, has not been departed from. The prohibition rests on grounds which, so far from making a distinction between the States, apply to them all alike. The fact that the ceded territory is within the limits of Minnesota is a mere incident; for the act of Congress imported into the treaty applies alike to all Indian tribes occupying a particular country, whether within or without state lines. Based as it is eclusively on the Federal authority over the *subject-matter*, there is no disturbance of the principle of State equality. [*Id.* at 197 (emphasis in original).]

See also Dick v. United States, 208 U.S. 340, 359 (1908) (rejecting Idaho's equal footing claim and enforcing treaty providing that United States liquor statutes would apply on Indian lands and ceded lands for a period of 25 years); *Johnson v. Gearlds*, 234 U.S. at 439 (rejecting Minnesota's equal footing claim and enforcing treaty providing that United States liquor statutes would apply in ceded lands "until otherwise provided by Congress"). *Cf. Ex Parte Webb*, 225 U.S. 663, 690-91 (1912) (holding that the act admitting Oklahoma to the Union did not repeal a federal liquor statute, expressly or by implication); *Perrin v. United States*, 232 U.S. 478 (1913) (rejecting the argument that a treaty regulating liquor on ceded lands was invalid as an encroachment on the State's exclusive authority to regulate liquor).[12]

The absence of a plain statement requirement in this area is particularly significant. There is an "historical tradition of concurrent state and federal jurisdiction over

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[12] The cases cited involve treaties concluded before and after Statehood, but that fact does not alter the equal footing analysis: "[I]f the making of such a treaty after the admission of the State is not inconsistent with the 'equal footing' of the State with the others . . . it seems to us to result that there is nothing in the effect of 'equal footing' clauses to operate as an implied repeal of such a treaty when previously established." *Johnson v. Gearlds*, 234 U.S. at 439.

the use and distribution of alcoholic beverages in Indian country," and the "State has an unquestionable interest in the liquor traffic that occurs within its borders." *Rice v. Rehner*, 463 U.S. 713, 724 (1983). Nonetheless, a treaty requiring Federal regulation of liquor on ceded lands does not impair a State's equal footing right, and Statehood does not terminate by implication treaties impairing the State's authority over liquor. The issue in such cases—as in other areas of concurrent State and Federal Government jurisdiction—is only whether application of a State liquor law or regulation "would impair a right granted or reserved by federal law." *Id.* at 726 (citation omitted).[13]

3. At issue here is the State's police power over wildlife. It is neither a necessary sovereign power (like the power to locate the State capital) nor a fundamental sovereign power (like sovereign title to submerged lands). It is a power that coexists with clear Federal authority regarding the same subject matter. In this section, Amici show that the power is akin to the State's police power over liquor, and that this Court's cases have treated it so.

There can be no doubt about "the importance to its people that a State have power to preserve and regulate the exploitation of an important resource," such as the State's wildlife. *Hughes v. Oklahoma*, 441 U.S. 322, 335 (1979), quoting *Toomer v. Witsell*, 334 U.S. 385, 402 (1948). "States have broad trustee and police powers

[13] *See also Hauenstein v. Lynham*, 100 U.S. 483 (1879). In that case, the Court construed a treaty with Switzerland and addressed the disposition upon death of real property located in the United States but owned by Swiss citizens. The State's power to control the conveyance of real property within its borders is historically strong and substantial, but the Court had little trouble concluding that the treaty's provisions displaced State authority. Most pertinent here, the Court stated that "[w]here a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred." *Id.* at 487. Put differently, the Court did not attempt to give the treaty a narrow construction to avoid impairing the State's police power over real property conveyance.

over wild animals within their jurisdictions." *Kleppe v. New Mexico*, 426 U.S. at 545. Those powers are, however, subject to an important limitation: The State's "exercise [of its authority] may be not incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution." *Id.* at 545 (quotation omitted).

Accordingly, the State's regulatory authority over wildlife is limited by federal constitutional provisions, such as the Commerce Clause (*see Hughes v. Oklahoma*), and the Privileges and Immunities Clause (*see Toomer v. Witsell*; *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978)). In addition, and most relevant here, the Supremacy Clause limits State power to regulate wildlife when the Federal Government legitimately exercises one of its enumerated powers to enter into treaties or make laws and regulations concerning wildlife. *See Kleppe v. New Mexico* (Wild Free-Roaming Horses and Burros Act); *Missouri v. Holland*, 252 U.S. 416 (1920) (Migratory Birds Treaty Act); *Hunt v. United States*, 278 U.S. 96 (1928) (Federal regulation authorizing thinning of deer population in violation of State law). Indeed, *Missouri v. Holland* flatly rejects the argument that legislation enforcing a treaty regulating treatment of migratory birds is "an unconstitutional interference with the rights reserved to the States by the Tenth Amendment, and . . . invades the sovereign right of the State." 252 U.S. at 431.[14]

Federal treaties and laws respecting wildlife thus do not impinge on fundamental sovereign powers of the State

[14] Citing *Geer v. Connecticut*, 161 U.S. 519 (1896), the State argued that its power over wildlife could not be impaired because it "owned" the wildlife within its borders. The Court characterized this argument as leaning on a "slender reed," 252 U.S. at 434. *Geer* was called into question for years and formally overruled in *Hughes*, 441 U.S. at 325-36.

that are protected by the Equal Footing Doctrine.[15] In this century, the Court has not required a Federal law or treaty regulating wildlife to contain a plain statement of Federal intent to prevent or limit State regulation of wildlife. Neither *Missouri v. Holland* nor any of this Court's cases interpreting treaties reserving usufructuary rights on off-reservation lands even hint at such a requirement. To the contrary, in such cases, as in many other cases involving construction of treaties with Indian tribes, the Court liberally and generously construes the reserved treaty rights at issue and rejects the argument that enforcement of such rights violates the State's equal footing right. *See United States v. Winans*, 198 U.S. at 380 (interpreting Yakima Indians' treaty right "to tak[e] fish at all usual and accustomed places" as the Indians "understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection' " and rejecting the argument that Washington's admission to the Union abrogated the treaty); *Tulee v. Washington*, 315 U.S. at 683-85 (holding that Indians' treaty right to fish in the "usual and accustomed places" must be "generously" interpreted, and rejecting the State's argument that the treaty should not be construed to work any impairment of the State's "broad powers" to regulate wildlife); *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 397-98 (1968) (interpreting treaty right to fish "liberally" and "rejecting a strict, technical construction not in keeping with the justice of the case" and remanding for accommodation of rights); *Antoine v. Washington*, 420 U.S. at 199 (applying to a Congressional act ratifying an agreement to preserve a tribe's reserved usufructuary rights "[t]he canon of construction" that "the wording of treaties and statutes ratifying agreements with the Indians is not

[15] Minnesota is thus simply wrong as a matter of law when it asserts that its "interest in natural resource management is as important to its sovereignty as is its interest in owning and controlling the use of the beds of lakes and rivers." Brief at 37.

to be construed to their prejudice" and enforcing treaty rights).

In two of the above-cited cases (*Winans* and *Tulee*), as in cases involving other aspects of State police power (*Winters, Dick, Gearlds, Ex Parte Webb*), the Court expressly held that tribal rights reserved by treaty are not implicitly repealed by an act admitting a State to the Union. These holdings are specific examples of the Court's general rule that Federal action will not be deemed to impair treaty rights absent "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *See United States v. Dion*, 476 U.S. at 740. *See also Menominee Tribe v. United States*, 391 U.S. 404, 415 (1968).

The Court's decisions clearly chart the proper course here. The 1837 Treaty must be generously construed, and the usufructuary rights reserved in that Treaty may not be deemed repealed by implication when Minnesota became a State in 1858. The Federal treaty rights and State regulation of wildlife must be reconciled, if possible.[16]

Over the years, in cases involving usufructuary rights on off-reservation lands, the Court has developed a general rule governing the reconciliation of usufructuary rights reserved by Federal treaty and State regulation of

[16] As explained above, the timing of the State's admission does not affect the validity of a treaty right under the Equal Footing Doctrine. *See* note 12, *supra*. The Court's presumption that federally-recognized reservations of usufructuary rights are not repealed by implication at Statehood, however, is doubly warranted. When a tribe reserves rights in a treaty, the United States does not obtain sovereign authority over the tribe's exercise of such rights and thus cannot bequeath such authority to the new State. *See, e.g., United States v. Winans*, 198 U.S. at 381 ("the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those [usufructuary rights] not granted").

wildlife: Treaty rights must be enforced except to the extent that they are inconsistent with State regulations "necessary in the interest of conservation." *Antoine v. Washington*, 420 U.S. at 204-07.[17] This reconciliation of State and Federal interests accounts for the State's strongest interest without abrogating the Federal right. In *Antoine*, the Court explained why it requires this particular accommodation of the Federal right:

> [The Federal act] must be construed to exempt the Indians' preserved rights from like state regulation, however, else Congress preserved nothing which the Indians would not have had without that [action.] For consistency with the canon that the wording is not to be construed to the prejudice of Indians makes it impermissible in the absence of explicit congressional expression, to construe the [acts] as "an impotent outcome to negotiations and a convention which seemed to promise more and give the word of the Nation for more." [420 U.S. at 199 (citation omitted).]

In this case, the district court and court of appeals upheld the Federal treaty right and ordered reconciliation

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[17] *See also United States v. Winans*, 198 U.S. at 382-84 (treaty right "to tak[e] fish at all usual and accustomed places" is not abrogated by Washington's admission to the Union; remanding for accommodation of the treaty right and State regulation); *Tulee v. Washington*, 315 U.S. at 683-84 (Indians' treaty right to fish in the "usual and accustomed places" did not unlawfully impair the State's "broad powers" to regulate wildlife; requiring reconciliation of the treaty right with State regulation); *Puyallup Tribe v. Department of Game*, 391 U.S. at 401 n.14 (treaty right must accommodate State regulation necessary for conservation); *Department of Game v. Puyallup Tribe*, 414 U.S. 44 (1973) (requiring accommodation of treaty right to fish and State regulation of commercial net fishing for steelhead in Puyallup River run); *Washington v. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 682 (1979) (treaty rights and State wildlife regulation must be reconciled; tribe's rights "are immune from all regulation save that required for conservation").

of the right and State laws necessary for conservation, just as this Court has instructed.[18]

II. *WARD v. RACE HORSE* SHOULD BE OVERRULED.

Petitioners rely solely on *Ward v. Race Horse*, 163 U.S. 504 (1896), to argue that the usufructuary rights reserved in the 1837 Treaty terminated when Minnesota became a State. In that case, the Court held that a treaty reserving to a tribe "the right to hunt on the unoccupied lands of the United States, so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts" terminated by its own terms when Wyoming became a State. The Court provided two rationales for its holding, neither of which has been good law since the turn of the century.

A. The Court in *Race Horse* erroneously believed that the State's police power over wildlife is an indefeasible sovereign power—in the words of the Court "an essential attribute of its governmental existence," 163 U.S. at 516.

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[18] Minnesota objects to *any* impairment of its "authority to unilaterally make management decisions regarding a wide variety of natural resource issues within the ceded territory" and attempts to arouse the Court's concern that the Federal courts will end up providing detailed supervision of such issues in Minnesota. Brief at 37-38. But Minnesota does not have "unilateral" authority over natural resource issues in the State; it shares its authority with the Federal Government. The Constitution requires the State to accommodate its regulation to Federal law, including reserved treaty rights of the tribes. This shared authority exists in Minnesota and in numerous other jurisdictions where tribes have usufructuary rights on off-reservation lands within State borders and, contrary to Minnesota's dire speculation, is generally exercised by the parties without significant Federal court intervention. *See* Brief of Bad River Band of Lake Superior Chippewa Indians (providing detailed description of the cooperative, effective, non-litigious relationship among Federal, State, and Tribal resource regulators and managers); *Casting Light Upon the Waters* (1991, 1995 editions) (describing the success of cooperative Federal, State and Tribal management of fishing in ceded areas in Wisconsin).

Relying on this faulty premise, the Court treated the reserved usufructuary rights as terminated by necessary implication when the lands became part of a State.

The *Race Horse* opinion leaves no room for doubt that this fundamental mistake lies at the heart of its holding. The Court flatly states that a tribal reservation of usufructuary rights on lands outside of a reserved area is "irreconcilably" in conflict with the powers of the State over wildlife, because "when the United States ha[s] called into being a sovereign State, a necessary incident of [its] authority [i]s the complete power to regulate the killing of game within its borders." *Id.* at 510. Thus, the *Race Horse* Court reasoned, the United States must have intended to terminate the usufructuary rights reserved in the 1869 Treaty when it admitted Wyoming to the Union:

> The two facts, the privilege conferred and the act of admission, are irreconcilable in the sense that the two under no reasonable hypothesis can be construed as coexisting. [If the treaty stands, then Wyoming was admitted] not as an equal member, but as one shorn of a legislative power vested in all the other States of the Union, a power resulting from the fact of statehood and incident to its plenary existence. [*Id.* at 514.]

The Court believed that if a treaty expressly states that usufructuary rights are terminated when the United States conveys title to the lands where they may be exercised, then, *a fortiori*, the treaty must be interpreted to terminate such rights when the lands become part of a State, because at Statehood, the "United States parted with its *entire authority* over the capture and killing of game." *Id.* at 55 (emphasis added).

The cases cited by Amici, including *Kleppe*, *Holland*, *Hunt*, *Winans*, and *Antoine*, demonstrate with unmistakable clarity that while the State has an important interest in the regulation of wildlife within its borders, the State

shares this authority with the Federal Government, and that State regulation must recede before a valid Federal exercise of the treaty power or any other constitutional source of Federal authority. In sum, the foundation of *Race Horse* has crumbled, and therefore the remainder of *Race Horse* should not stand.

B. The Court provided an alternative rationale for its decision in *Race Horse*. The Court assumed "for the sake of the argument," that if Congress were to create rights in a territory which are "of such a nature as to imply their perpetuity, and the consequent purpose of Congress to continue them in the State, after its admission," the Court would uphold such rights "although the enabling act does not expressly so direct." *Id.* at 515. But, the Court stated, "[h]ere the nature of the right created gives rise to no such implication of continuance, since, by its terms, it shows that the burden imposed on the Territory was essentially perishable and intended to be of a limited duration," because the "hunting privilege was to cease whenever the United States parted merely with the title to any of its lands." *Id.*

In other words, the Court stated that the treaty must be interpreted to provide for termination of the reserved usufructuary rights under two sets of conditions—one express and one implied. The treaty expressly terminated the rights if the United States conveyed title to the lands, if the lands became "occupied," or if there were no longer peace on the borders of the hunting districts. Because these limitations demonstrated that the reserved rights were temporary, the Court read into the treaty an additional implied condition under which the usufructuary rights would terminate—if the unoccupied lands were to become part of a State.

It is, at the very least, unusual for a court to add an implied provision to a list of express provisions for termination of treaty rights. The *Race Horse* approach is particularly odd because the implied provision is neither

derived from nor related to the express provisions themselves. *See e.g., O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86-87 (1994); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993); Singer, 2A Sutherland Statutory Construction §§ 47.23-25 (1992 ed.). There is no clear nexus between the fact that the right would terminate under the circumstances explicitly set forth in the treaty and termination upon Statehood. Indeed, if the reserved rights were merely temporary, they would seem to represent a smaller, and thus more acceptable, encroachment on the State's police power than would a permanent treaty right. Add to these points the presumption against implied impairment of treaty rights, and the Court's interpretation of the treaty in *Race Horse* represents a substantial departure from ordinary principles of treaty construction.

Equally to the point, both steps in the Court's alternative rationale—its interpretation of the treaty right as temporary and its extrapolation that temporary rights were necessarily repealed by implication at Statehood—are faulty. The treaty reserved usufructuary rights on the "unoccupied lands of the United States" so long as game was present and there was peace between whites and Indians. That right was temporary only if the United States' occupation of the lands identified in the treaty was temporary. Although the United States generally sought to convey title to lands in the western Territories to settlers,[19] there was no constitutional or legal requirement that it do so. Under the Property Clause of the United States Constitution, Art. IV, section 3, cl. 2, the Federal Government has the right to convey land *or* to retain title

[19] *See* C. Landever, "Whose Home on the Range? Equal Footing, the New Federalism and State Jurisdiction on Public Lands," 47 Fla. L. Rev. 557, 566 (1995) (making constitutionally based argument for concurrent Federal-State authority over Federal lands within State borders).

and use the land for federal purposes. *See* note 6 *supra*.[20] The Court's assumption that the treaty right was temporary because the United States had to convey or occupy the land was incorrect.

Second, this Court's cases make clear that, as a general matter, a treaty right which may be of limited duration is *not* presumptively terminated by Statehood. In *Wisconsin v. Hitchcock*, 201 U.S. at 213, the State asserted that tribal members' treaty right to land "until they were required to surrender it by the President of the United States" was terminated by Wisconsin's admission to the Union. In *Dick v. United States*, 208 U.S. 340 (1908), the State contended that a tribe's treaty right to the protection of federal liquor laws for 25 years was terminated by Idaho's admission to the Union. And in *Johnson v. Gearlds*, 234 U.S. 422 (1914), the State maintained that a tribe's treaty right to the protection of federal liquor laws "until otherwise provided by Congress" was terminated by Minnesota's admission to the Union. The Court firmly rejected the argument that these treaty rights —plainly subject to express provisions regarding termination just as the treaty right in *Race Horse* was—had been terminated by implication at Statehood. Instead, applying ordinarily principles of construction, the treaty rights were deemed to terminate if and when the condition stated in the treaty was met.

The Court drove itself to the conclusion that the treaty right in *Race Horse* was temporary and thus terminated

[20] *See also Light v. United States*, 220 U.S. at 537 (the courts "cannot compel [the Congress] to set aside the [public] lands for settlement; or to suffer them to be used for agricultural or grazing purposes; nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes"); *Stearns v. Minnesota*, 179 U.S. 223, 243 (1900) ("if Congress should determine that the great body of public lands within the State of Minnesota should be reserved from sale for an indefinite period it might do so, and thus the lands be exempted from taxation. . . .").

at Statehood, because it did not believe that the United States could require the State to accommodate its police power over wildlife with a Federal treaty reserving usufructuary rights on lands outside of a reservation and within a State's borders. *See id.* at 515. But under this Court's subsequent, better reasoned decisions, the United States unquestionably has such power, and the second rationale of *Race Horse* is just as hollow as the first.

C. At the end of the day, there is little of *Race Horse* that survives or should survive. To accept Minnesota's position, the Court would have to overrule more than a century's worth of Indian treaty cases on the basis of an expansive reading of a single decision, the fundamental tenets of which have been discredited for nearly as long. The notion that the State's police power over wildlife is irreducible cannot conceivably be squared with this Court's established authority to the contrary. Equally untenable is the conclusion that any reserved treaty right that is temporary is terminated by implication at Statehood. Finally, since the United States has an established right to retain public lands within State borders for public purposes, the presumption that the reserved right to hunt on "unoccupied lands" of the United States is temporary is also erroneous. What remains is only the proposition for which this Court has cited *Race Horse* in this century—that States can regulate usufructuary rights reserved in a treaty when necessary in the interest of conservation. *E.g., Washington v. Passenger Fishing Vessel Ass'n*, 443 U.S. at 682 n.25. That narrow conclusion simply does not alter the outcome in this case, and the Court should take this opportunity to complete the return of the Equal Footing Doctrine to its legitimate role in safeguarding essential elements of State sovereignty and no more.

CONCLUSION

For these reasons, the decision of the Court of Appeals should be affirmed.

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